Supreme Court U.S.
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IN THE

Supreme Court of the United States

BAHMAN PAYMAN, M.D.,

Petitioner,

v.

KHALOUCK ABDRABBO, M.D.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the filing of an amended complaint within 21 days after service of a motion for sanctions constitutes a withdrawal of the challenged original complaint within the meaning of Rule 11(c)((1)(A) of the Federal Rules of Civil Procedure.

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Bahman Payman (Payman) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Fourth Circuit issued an unpublished opinion on December 16, 2003 (App. A), affirming the judgments of the United States District Court for the Western District of Virginia, entered on November 1, 2002 (App. B) and March 3, 2003 (App. C).

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT FEDERAL RULE OF CIVIL PROCEDURE

Rule 11(c)(1)(A) provides, in pertinent part, as follows:

> A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, counterclaim, allegation, or denial is not withdrawn or appropriately corrected. . . .

STATEMENT OF THE CASE

Payman filed *pro se* a Complaint against Khalouck Abdrabbo (Abdrabbo) in the United States District Court for the Western District of Virginia in Case No. 2:02CV00035 on February 5, 2002 (App. D), alleging damages resulting from Payman's discharge from Lee County Community Hospital in 2000.[1] purposes of this petition for writ of certiorari. Payman contended that Abdrabbo "misrepresented me in bad faith and malicious intent" and caused Payman to suffer "economical loss" and "psychological as well as emotional burdens."

On June 27, 2002, Payman, by counsel[2] courts below, filed a Motion For Leave To File Amended Complaint And For Leave For Additional Time To Respond To Motions To Dismiss And For Summary Judgment (App. E). The District Court entered an order granting the Motion on July 3, 2002, and set July 25, 2002, as the deadline for filing the Amended Complaint. (App. F).

On June 28, 2002, Abdrabbo mailed to Payman a Motion for Sanctions (App. G) under Rule 11(c)(1)(A) of the Federal Rules of Civil Procedure, alleging that Payman filed the Complaint for "an improper purpose," that the claims he alleged "are not warranted by existing law . . . ," and that Payman's allegations "lack evidentiary support."

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1. The companion case *Bahman Payman v. Atique Mirza*, Case No. 2:02CV00023, is irrelevant for purposes of this petition for writ of certiorari

2. Michael A. Bragg, Esq. represented Payman in the courts below.

After receiving leave from the District Court on July 3, 2002, Payman, by counsel, filed an Amended Complaint (App. H) on July 23, 2002, alleging in Count I that "[t]he acts of Defendant and his co-conspirators were tortious, malicious, in bad faith and in violation of Virginia Code § 18.2-499," and in Count II that "[d]efendant has intentionally, willfully, maliciously and in bad faith interfered with Plaintiff's then existing contractual relationships and his legitimate professional expectancies and opportunities."

On November 1, 2002, the District Court granted summary judgment in favor of Abdrabbo (App. B).

On March 3, 2003, the District Court entered judgment for Abdrabbo on his Motion for Sanctions (App. C), because "the plaintiff's initial pro se complaints were factually insupportable. . . ."

After timely appeal to the United States Court of Appeals for the Fourth Circuit, the Court of Appeals affirmed the judgments of the District Court. (App. A).

REASON FOR GRANTING THE PETITION

THIS CASE INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN SETTLED, BUT SHOULD BE SETTLED, BY THIS COURT

First enacted in 1937, Rule 11 of the Federal Rules of Civil Procedure was amended in 1983, 1987, and, most recently, in 1993. The 1993 amendments were significant, as they were "intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the Rule." Fed. R. Civ. P. 11 Advisory Committee Notes (1993 Amendment) at 92 (West 2003). The purpose of the 1993 amendments was to place "greater constraints on the imposition of sanctions and . . . reduce the number of motions for sanctions presented to the court." *Id.* at 92-93.

The 1993 amendments inserted a "safe harbor" provision that permitted the party alleged to have committed sanctionable conduct to withdraw the challenged document within 21 days after service of a motion for sanctions. Rule 11 cases following the enactment of the 1993 amendments "have found the 'safe harbor' provisions to be an absolute requirement." *Ridder v. City of Springfield*, 109 F.3d 288, 296 (6th Cir. 1997); *see also Barber v. Miller*, 146 F.3d 707, 710-11 (9th Cir. 1998) (safe harbor period mandatory); *Elliott v. Tilton*, 64 F.3d 213, 216 (5th Cir. 1995) (notice and opportunity to withdraw or correct are mandatory). *But see Rector v. Edwin Rector 1995 Charitable Remainder Trust*, 275 F.3d 248, 254 (4th Cir. 2001) (safe harbor provision is not jurisdictional and is waivable). The "safe harbor" period begins only upon service of the motion for sanctions. *Gordan v. Unifund CCR Partners*, 345

F.3d 1028, 1030 (8th Cir. 2003), *citing* Fed. R. Civ. P. 11, Advisory Committee Notes (1993 Amendments). One court described the "safe harbor" provision of Rule 11 as follows:

> The "safe harbor" provision requires the party moving for sanctions to notify the party against which it seeks sanctions of its intention to move for sanctions. The court can impose sanctions only if, after twenty-one days, the nonmoving party has not withdrawn the offending petition or "acknowledged candidly that it does not currently have evidence to support a specified allegation. Fed. R. Civ. P. 11 Advisory Committee Notes (1993 Amendment) at 89 (West 1998). The express purpose of this amendment to the rule was to prevent abuses of Rule 11 sanctions by providing parties a "safe harbor" within which they will not be subject to sanctions unless they refuse to withdraw the offending papers filed with the court. *Id.*

Hockley v. Shan Enterprises Limited Partnership, 19 F. Supp. 2d 235, 240 (D. N.J. 1998).

Another court explained that "[t]his 'safe harbor' provision has the salutary effect of providing appropriate due process considerations to sanction litigation, reducing Rule 11 volume and eliminating abuses proscribed by this Rule." *Photocircuits, Corp. v. Marathon Agents, Inc.*, 162 F.R.D. 449, 452 (E.D. N.Y. 1995).

One day prior to Abdrabbo's mailing his Motion for Sanctions to Payman, Payman filed a Motion for Leave to

File Amended Complaint.[3] *Bhd.*, 177 F.R.D. 351, 354-55 (E.D. Va. 1998). After receiving leave from the United States District Court on July 3, 2003, Payman filed an Amended Complaint on July 23, 2002. Abdrabbo did not file a second Motion for Sanctions in response to Payman's Amended Complaint.

Payman's filing of his Amended Complaint occurred within the 21 day "safe harbor" period.[4] issue in the courts below. Abdrabbo mailed his Motion for Sanctions to Payman on June 28, 2002. Rule 11 provides that service of a Motion for Sanctions shall be served as provided in Rule 5. Rule 5(b)(2)(B) provides for service by mailing, as occurred in the instant case.

Rule 6(e) states as follows:

> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party under Rule 5(b)(2) (B), (C), or (D), 3 days shall be added to the prescribed period.

Rule 6(a) provides that the first day of the designated period of time shall not be included in the computation, and

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3. One court has held that the filing of a Motion for Leave to File Amended Complaint can, by itself and under the appropriate circumstances, constitute an informal withdrawal of a complaint within the meaning of Rule 11(c)(1)(A). *See Dee-K Enterprises, Inc. v. Heveafil Sdn, Bhd.*, 177 F.R.D. 351, 354-55 (E.D. Va. 1998).

4. Timely filing of the Amended Complaint was not at issue in the courts below.

that the last day of the period computed shall not include a Saturday, Sunday, or legal holiday.

The time that lapsed between the mailing of the Motion for Sanctions (Friday, June 28, 2002) and the filing of the Amended Complaint (Sunday, July 23, 2002) included two days in June (June 29th and June 30th) and 23 days in July, for a total of 25 days. Rule 6(e) authorizes the deduction of three days, and Rule 6(a) does not require inclusion of July 22nd (Saturday) or July 23rd (Sunday). Accordingly, Payman filed his Amended Complaint within the 21 days allowed under the "safe harbor" provision of Rule 11.

The "safe harbor" provision of Rule 11 is meaningless without a precise understanding as to what constitutes a withdrawal of a challenged pleading. If this Court grants his petition for certiorari, Payman will argue that the filing of an amended complaint within the 21 day "safe harbor" period constitutes, as a matter of law, a withdrawal of the challenged complaint within the meaning of Rule 11(c)(1)(A).

The Court of Appeals disagreed with Payman's position, as follows:

> We also find unavailing Payman's argument that new motions for sanctions should have been served in light of the filing of the amended complaints, particularly given that the amended complaints did not substantively differ from the original complaints and there was no attempt to cure the alleged lack of evidentiary support for his claims in the original complaints.

Payman v. Mirza, 2003 U.S. App. LEXIS 25305 (4th Cir. December 16, 2003).

In reaching its decision, the Court of Appeals ignored the well-established rule that an amended complaint supercedes the original complaint and renders it "non-existent." *See Truesdell v. Southern California Permanente Medical Group*, 293 F.3d 1146, 1153 (9th Cir. 2002)[5] "safe harbor" provisions of Rule 11, *citing Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). *Accord*, *Fullerton v. Maynard*, *1991 U.S. App. LEXIS 20869* (10th Cir. August 29, 1991) ("It is a well-established general rule that an amended complaint . . . supercedes the complaint it modifies and renders the prior complaint of no legal effect"), *citing Bolens v. Redman Homes*, 759 F.2d 504, 508 (5th Cir. 1985) (amended complaint ordinarily supercedes the original and renders it of no legal effect, unless the amended complaint specifically refers to or adopts the earlier pleading);[6] 6 C. Wright, A Miller & M. Kane, Federal Practice and Procedure: Civil 2d § 1476 (1990) (after filing of an amended complaint, original pleading no longer has a function in the case)

It violates the plain meaning of Rule 11(c)(1)(A) to conclude that a pleading that is "non-existent" and "of no legal effect" has not been withdrawn. *See Truelove v. Heath*, 1996 U.S. App. LEXIS 11688 (4th Cir. 1996), *citing Pavelic & Le Flore v. Marvel Entertainment Group*, 493 U.S. 120, 123, 110 L. Ed. 2d 438, 110 S. Ct. 456 (1989) ("In interpreting Rule 11 we give the rule its plain meaning"). Failure to comply with the precise requirements of Rule 11(c)(1(A)

5. In *Truesdell*, the trial court dismissed the case with leave to amend by a date certain. Plaintiff, nonetheless, never filed a first amended complaint, and the court upheld the imposition of sanctions and found no violation of the "safe harbor" provisions of Rule 11.

6. Payman's amended complaint makes no specific reference to the original complaint.

renders the "safe harbor" provision meaningless. *See Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 789 (9th Cir. 2001) (court disapproved attempt to render safe harbor provision meaningless). If Abdrabbo believed that the Amended Complaint did not cure the defects of the original Complaint, Rule 11(c)(1)(A) directs that he serve a motion for sanctions upon Payman as to the filing of the Amended Complaint, which Abdrabbo failed to do.

No case of which Payman is aware has decided whether an amended complaint, filed with leave of court and within the 21 day "safe harbor" period, constitutes, as a matter of law, a withdrawal of the "challenged paper" within the meaning of Rule 11(c)(1)(A).[7] Such a determination is critical to all courts that must interpret the meaning of the "safe harbor" provision of Rule 11.

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7. *Harris v. Franklin-Williamson Human Services, Inc.*, 97 F. Supp. 2d 892 (S.D. Il. 2000) is distinguishable because the court never granted plaintiff leave to file a second amended complaint. Accordingly, the first amended complaint was still the valid complaint of the case. The court found that plaintiff had failed to correct or withdraw the allegations in the first amended complaint within the 21 day "safe harbor" period, and granted defendants' motion for sanctions.

CONCLUSION

For the reasons set forth above, Payman asks this Court to grant his petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED DECEMBER 16, 2003

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 02-2407, No. 02-2408, No. 03-1392, No. 03-1393

August 25, 2003, Submitted

December 16, 2003, Decided

BAHMAN PAYMAN,

Plaintiff-Appellant,

v.

ATIQUE MIRZA,

Defendant-Appellee.

BAHMAN PAYMAN,

Plaintiff-Appellant,

v.

KHALOUCK ABDRABBO,

Defendant-Appellee.

BAHMAN PAYMAN,

Plaintiff-Appellant,

Appendix A

v.

KHALOUCK ABDRABBO,

Defendant-Appellee.

BAHMAN PAYMAN,

Plaintiff-Appellant,

v.

ATIQUE MIRZA,

Defendant-Appellee.

JUDGES: Before MOTZ, GREGORY, and SHEDD, Circuit Judges.

OPINION

PER CURIAM:

Bahman Payman filed separate, but nearly identical, civil actions against the Defendants, Atique Mirza and Khalouck Abdrabbo, alleging violations of the *Virginia Conspiracy Act* and tortious interference. The district court granted Defendants' motions for summary judgment on both claims and by separate judgments subsequently granted Defendants' motions for Fed.R.Civ.P. 11 sanctions, awarding them each $2500. On appeal, Payman contends: (1) the district court erred in denying his request for discovery prior to granting summary judgment; (2) the district court erred in granting Defendants' motions for summary judgment on Payman's

Virginia Conspiracy Act and tortious interference claims; and (3) the district court violated Rule 11's "safe harbor" provision in imposing sanctions against him.

On appeal, Payman first argues that the district court erred in denying his motion to stay proceedings on Defendants' motions for summary judgment to permit the commencement of discovery. Payman essentially takes issue with the court's decision to enter summary judgment in favor of the Defendants before allowing him to conduct discovery. As a general rule, summary judgment is appropriate only after adequate time for discovery. *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 961 (4th Cir.1996) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986)). A party who has no specific material contradicting his adversary's presentation of summary judgment may survive a summary judgment motion if he presents valid reasons justifying the failure of proof. Fed.R.Civ.P. 56(f). In addition, a party must file an affidavit setting forth reasons why discovery is needed. *Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir.1995). The district court's denial of a Rule 56(f) request is reviewed under an abuse of discretion standard. *Id.* We have reviewed the pleadings in light of the arguments presented and find no abuse of discretion.

Payman also challenges the district court's grant of summary judgment to the Defendants on his Virginia civil conspiracy and tortious interference claims. This court reviews an award of summary judgment de novo. *Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir.1988). Summary judgment is appropriate only if there are no genuine

issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986). This court views the evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986). We conclude that the district court did not err in granting Defendants' motions for summary judgment.

With respect to Payman's appeals of the court's judgments imposing sanctions against him, this court reviews the imposition of Rule 11 sanctions for abuse of discretion. *Chaudhry v. Gallerizzo,* 174 F.3d 394, 410 (4th Cir.1999). Specifically, Payman argues that the "safe harbor" provisions of Rule 11 required that the Appellees serve new motions for sanctions following the filing of the amended complaints and that the motions be filed prior to the disposition of the cases. Payman's argument is unavailing. Because Mirza's and Abdrabbo's motions were served more than twenty-one days prior to the filing of the motions in court and prior to any final disposition of the case, we find no Rule 11 violation. *See also Hunter v. Earthgrains Co. Bakery,* 281 F.3d 144, 152 (4th Cir.2002) (noting that Rule 11's "safe harbor" provision precludes the serving and filing of any Rule 11 motion after conclusion of the case). We also find unavailing Payman's argument that new motions for sanctions should have been served in light of the filing of the amended complaints, particularly given that the amended complaints did not substantively differ from the original complaints and there was no attempt to cure the alleged lack of evidentiary support for his claims in the original complaints.

Accordingly, we affirm the district court's judgments in these cases. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, BIG STONE GAP DIVISION FILED NOVEMBER 1, 2002

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA BIG STONE GAP DIVISION

Case No. 2:02CV00035

BAHMAN PAYMAN, M.D.,

Plaintiff,

v.

KHALOUCK ABDRABBO, M.D.,

Defendant.

OPINION

By: James P. Jones
United States District Judge

In this action for conspiracy and interference with contractual relationship and professional opportunities, brought by one physician against another, I grant summary judgment in favor of the defendant.

I

In his Amended Complaint, the plaintiff, a physician, claims that the defendant, another physician who is a citizen of Syria, conspired with other physicians in 1999 and 2000

to interfere with the plaintiff's contractual relationship with Lee County Community Hospital, located in Pennington Gap, Virginia, and with the plaintiff's "reasonable professional opportunities with other hospitals" so as to injure him "in his professional reputation and profession."[1] He asserts that the defendant is liable under the Virginia conspiracy statute[2] and common law principles.[3]

The defendant has moved for summary judgment.[4] In response, the plaintiff seeks leave to conduct discovery in order to respond to the Motion for Summary Judgment[5] and alternatively, opposes summary judgment based on his own affidavit. The motions are now ripe for decision.

Based on the summary judgment record, the essential facts of the case are as follows.

Bahman Payman, M.D., was employed by Lee County Community Hospital, Inc. (the "Hospital") beginning in 1992 pursuant to a written Employment Agreement.[6] According

1. Am. Compl ¶ 3.

2. Va.Code Ann. §§ 18.2-499, 500 (Michie 1996).

3. *See* Am. Compl. ¶¶ 6, 8. Jurisdiction of this court exists pursuant to diversity of citizenship and amount in controversy. *See* 28 U.S.C.A. § 1332(a) (West 1993 & Supp.2002).

4. *See* Fed.R.Civ.P. 56(b).

5. *See* Fed.R.Civ.P. 56(f).

6. *See* Payman Aff. Opp'n to Mot. Summ. J. (hereafter "Payman Aff.") Ex. B.

to the contract, Payman's employment was subject to termination for cause at any time or without cause upon 120 days notice.[7] Payman specializes in obstetrics and gynecology[8] and apparently served as an employee without incident until October 27, 1999. On that day, according to him, a radiologist "misinterpreted a film" and diagnosed a severe birth defect in an unborn child.[9] The radiologist and a pediatrician advised the mother-a patient of Payman's-to transfer for delivery to another hospital that had a neonatal intensive care unit. Payman disagreed and four physicians went to the Hospital administration in an unsuccessful attempt to require Payman to transfer the patient. Payman in turn complained about the physicians interfering with his clinical judgment.[10]

A few days later, Payman had a dispute with another staff physician, Dr. Ghullam Joyo, an anesthesiologist, over the placement of a fetal monitor during an emergency cesarean section, which resulted in a complaint being filed by Payman against Joyo with the Hospital administration. Payman alleged that Joyo had called him a "stupid doctor" in front of the patient.[11] Both Payman and Joyo received written admonishments from the Hospital administrator.[12]

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7. Employment Agreement ¶¶ 13, 14.

8. *See* Payman Aff. ¶ 1.

9. Payman Aff. ¶ 10.

10. *See* Abdrabbo Decl. ¶ 10.

11. Payman Aff. ¶ 12. Payman sued Joyo for defamation over this incident, but the case was dismissed by this court because it was

(Cont'd)

Appendix B

By letter dated February 10, 2000, the Hospital administrator gave Payman 120 days notice of termination without cause pursuant to the Employment Agreement. On March 1, 2000, the administrator notified Payman by letter that he was being terminated from employment for cause, although the cause was not specified.[13] Thereafter, Payman and the Hospital reached an agreement by which the Hospital would withdraw its notice of termination for cause; Payman would resign from his employment and his clinical privileges at the Hospital; and Payman would be paid for 120 days beginning from the earlier notice of termination without cause. Payman submitted his letter of resignation pursuant to this agreement on March 7, 2000.[14]

In his affidavit in opposition to the Motion for Summary Judgment, Payman claims that he was the victim of a conspiracy by Drs. Abdrabbo, Joyo, Ahsan, and Mirza. Dr. Ahsan, who is not an employee of the Hospital, is married to the pediatrician who attempted to obtain the transfer of Payman's patient to another hospital, as described above. Payman alleges that all of these physicians are of the Moslem faith and he is of the Bahai'i faith and that "[t]here is a long

(Cont'd)
barred by the applicable state statute of limitations. *See Payman v. Joyo,* No. 2:01CV000128, 2002 WL 1821635, at *1 (W.D.Va. Aug. 8, 2002).

12. *See* Payman Aff. ¶ 12.

13. *See* Payman Aff. Ex. F.

14. *See* Abdrabbo Decl. Ex. B.

history of persecution of the Bahai'i by Moslems."[15] He contends that Mirza and Abdrabbo drafted Payman's letter of resignation and that "important decisions" at the Hospital were made by Mirza and Ahsan and another physician, Dr. Laufer.[16]

Payman contends that at the time of his resignation Abdrabbo told him that "we will not give you good recommendation [sic] to get privileges at area hospitals,"[17] but he does not know whether any recommendations were given or not.[18] He has not been refused any such privileges although he contends that he has been advised by "various hospitals" that his applications could not be processed because the Hospital has not responded to requests for information.[19] He also claims that his application to reinstate his West Virginia medical license was delayed "for several months" because the Hospital failed to respond to a request for information.[20]

The defendant Abdrabbo is a gastroenterologist who was employed by the Hospital from 1995 until July of 2000.

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15. Payman Aff. ¶ 3.

16. *Id.* at ¶ 18.

17. Payman Aff. ¶ 19.

18. *See id.* at ¶ 20.

19. *Id.*

20. *Id.* at ¶ 21 (misnumbered as 18).

He is now on the faculty of the University of Virginia Medical School. During his last year at the Hospital, he served as chief of the Medical Staff, a member of the Medical Staff Executive Committee, and a member of Hospital's Board of Directors. He asserts that all actions he took regarding Payman were in his role as a member of these entities.[21] He denies that he has communicated with any hospitals or prospective employers regarding Payman.[22]

In support of his Motion for Summary Judgment, the defendant contends that Payman cannot make out a case of conspiracy because the Virginia conspiracy statute does not afford a cause of action based on a personal employment relationship and because of the intra corporate immunity doctrine. In addition, it is asserted that the defendant is immune from suit under the provisions of Virginia's medical immunity statute.[23]

II

I first must consider the plaintiff's request for additional discovery.

Summary judgment is appropriate when there is "no genuine issue of material fact," given the parties' burdens of

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21. *See* Abdrabbo Decl. ¶ 19.

22. *See id.* at ¶ 20.

23. *See* Va.Code Ann. § 8.01-581.16 (Michie Supp.2002).

proof at trial.[24] In determining whether the moving party has shown that there is no genuine issue of material fact, a court must assess the factual evidence and all inferences to be drawn therefrom in the light most favorable to the nonmoving party.[25] Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual basis."[26]

While a motion for summary judgment is often filed after discovery in a case is completed, Rule 56 permits a motion for summary judgment by a defendant "at any time."[27] However, the rule does provide protection for a party who is not prepared to oppose summary judgment. Rule 56(f) states as follows:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained

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24. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see* Fed.R.Civ.P. 56(c).

25. *See Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir.1985).

26. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

27. *See* Fed.R.Civ.P. 56(b); *Banks v. Mannoia*, 890 F.Supp. 95, 98 (N.D.N.Y.1995) (stating that "summary judgment can and often should be granted without discovery").

> or depositions to be taken or discovery to be had or may make such other order as is just.[28]

The party opposing summary judgment bears the burden of showing what specific facts he hopes to discover that will raise an issue of material fact.[29] "Vague assertions" that more discovery is needed are insufficient.[30]

The plaintiff has filed an affidavit pursuant to Rule 56(f). In it, he contends that additional discovery is required. The specifics of the information that he wishes to discover are "the scope of defendant's duties as an employee of [the Hospital]" and "whether the defendant's acts or omissions were in furtherance of any acts which . . . afforded immunity under the Virginia statute."[31]

I find the affidavit inadequate to allow discovery under Rule 56(f). There is no suggestion that the defendant was not a member of the Hospital's Medical Staff Executive Committee or Board of Directors or that these entities did not consider complaints against Payman. The plaintiff's affidavit in essence simply indicates that he does not know what, if anything, the defendant had to do with his difficulties with the Hospital. Indeed, the only specific act or omission

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28. Fed.R.Civ.P. 56(f).

29. *See Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir.1995).

30. *See id.*

31. Payman Aff. Pursuant to Rule 56(f) ¶ 2

alleged against the defendant in the plaintiff's affidavit in opposition to summary judgment-aside from the general claim of conspiracy-is that the defendant told him that he would not receive a good recommendation from the Hospital.[32]

Particularly in view of the defense of immunity, these allegations are insufficient. If a plaintiff could subject an immune defendant to discovery on such slim factual claims, the immunity promised by the Virginia statute would have little practical value.

Accordingly, the plaintiff's motion under Rule 56(f) will be denied.

III

On the merits of the summary judgment motion, I find that judgment should be entered for the defendant. As pointed out by the defendant, the Virginia conspiracy statute does not cover personal employment relationships.[33] Moreover, the doctrine of intra corporate immunity bars any conspiracy cause of action involving the Hospital and its agents, as alleged here.[34] Finally, the defendant is entitled to immunity

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32. *See* Payman Aff. ¶ 19.

33. *See Jordan v. Hudson*, 690 F.Supp. 502, 507-08 (E.D.Va.1988), *aff'd*, 879 F.2d 98 (4th Cir.1989).

34. *See Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 151 F.Supp.2d 723, 731 (W.D.Va.2001).

under the Virginia statute, which affords protection to "[e]very member of . . . any committee, board, group, commission or other entity . . . for any act, decision, omission, or utterance done or made in the performance of his duties . . ." when such entity "functions primarily to review, evaluate, or make recommendations on . . . the adequacy or quality of professional services. . . ."[35]

The immunity afforded by the statute does not apply where the defendant acts "in bad faith or with malicious intent."[36] No facts have been asserted that would produce a genuine issue of material fact in this regard. The only malice or bad faith asserted by the plaintiff is his claim that Moslems have persecuted the Bahai'i in Iran. That bald claim, even if true, does not implicate the defendant in any such practices.

IV

For the foregoing reasons, summary judgment will be entered in favor of the defendant as to the plaintiff's claims. A separate judgment consistent with this opinion is being entered herewith.

DATED: November 1, 2002

s/ James P. Jones
United States District Judge

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35. Va.Code Ann. § 8.01-581.16.

36. *Id.*

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, BIG STONE GAP DIVISION DATED MARCH 3, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA BIG STONE GAP DIVISION

Case No. 2:02CV00023
Case No. 2:02CV00035

BAHMAN PAYMAN, M.D.,

Plaintiff,

v.

ATIQUE MIRZA, M.D.,

Defendant.

BAHMAN PAYMAN, M.D.,

Plaintiff,

v.

KHALOUCK ABDRABBO, M.D.,

Defendant.

Appendix C

OPINION

By: James P. Jones
United States District Judge

The successful defendants in this civil case seek Rule 11 sanctions against the plaintiff. Finding that the plaintiff's initial pro se complaints were factually insupportable, I will grant such sanctions.

I

On February 5, 2002, the plaintiff, a physician, filed suit in this court against a former colleague, Atique Mirza, M.D. The pro se Complaint stated in its entirety as follows:

> I am Bahman Payman, MD. Filing suit against Dr. Atique Mirza who was chairman of the executive committee at Lee County Community Hospital in 2000. Dr. Mirza abused his power as a chairman of the executive committee and misrepresented me in bad faith and malicious intent at LCCH. Under the assumption that he has civil immunity (8.01-518.16.). He then left the area soon after LCCH was investigated by federal authorities.
>
> As a result LCCH terminated my employment, and I lost my eight years practice in Lee County, also I lost the good reputation that I had established. Besides economical loss, I have suffered

> psychological as well as emotional burdens along with my family.
>
> Therefore the plaintiff moves for a judgment against the defendant, Dr. Mirza, in the amount of ninety five thousand dollars ($95,000) together with cost and interest.
>
> /s Bahman Payman, M.D.

On that same day, the plaintiff filed a similar pro se action against another physician, Khalouck Abdrabbo, M.D., in the Circuit Court of Wise County, Virginia. The only difference between the pleadings other than the change of name of the defendant was that Dr. Abdrabbo was alleged to have been the "chief of medical staff" at Lee County Community Hospital. This state court action was thereafter removed by Dr. Abdrabbo to this court.

In both cases, the defendants served motions for sanctions pursuant to Federal Rule of Civil Procedure 11(c)(1)(A) on the pro se plaintiff on April 5, 2002. The plaintiff then obtained counsel, who filed an appearance in the Abdrabbo case on June 27, 2002, and in the Mirza case on August 22, 2002. Defense counsel pled amended complaints in the cases and the defendants thereafter moved for summary judgment. After briefing and oral argument, the court granted summary judgment for the defendants in both cases on November 1, 2002. *See Payman v. Mirza*, No. 2:02CV00023, 2002 WL 31443216 (W.D. Va. Nov. 1, 2002); *Payman v. Abdrabbo*, No. 2:02CV00035, 2002 WL 31443212 (W.D. Va. Nov. 1, 2002).

Appendix C

On November 13, 2002, the defendants filed with the court the motions for sanctions previously served on the plaintiff. The motions have been briefed and argued and are ripe for decision.

II

Rule 11 provides that by presenting a pleading to the court, an attorney or unrepresented party certifies

> that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
>
> (1) [the pleading] is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims . . . and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; [and]
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. . . .

Fed. R. Civ. P. 11(b). The defendants contend that the initial suit papers filed by the plaintiff pro se in both cases violated this rule. The defendants do not seek sanctions against the plaintiff's attorney for the filing of the amended complaints. In response, the plaintiff contends that his pleadings do not violate the rule and that the motions for sanctions are procedurally barred because they were filed after summary judgment had been granted.[1]

A.

I find the suit papers in these cases did violate Rule 11 because the allegations did not have evidentiary support. While the fact that the plaintiff's claims did not survive summary judgment is alone insufficient to justify sanctions, *see Miltier v. Downes*, 935 F.2d 660; 664 (4th Cir. 1991), it is clear that the plaintiff had no objectively reasonable evidence to support his assertion that Drs. Mirza and Abdrabbo acted in "bad faith" and "maliciously" toward him. In fact, the only supporting basis ever presented for these allegations is the plaintiff's claim that Moslems have persecuted those of the Bahai's faith in Iran. He has never explained why that was relevant to the plaintiff's relationships with the defendants.

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1. In Dr. Abdrabbo's case the initial pro se pleading was filed in state court. Nevertheless, it is sanctionable by this court since the plaintiff advocated it after removal here. *See Buster v. Greisen*, 104 F.3d 1186, 1190 n.4 (9th Cir. 1997). Moreover, Virginia law has a sanction provision similar to Rule 11, *see* Va. Code Ann.. § 8.01-271.1 (Michie 2000), .which this court may enforce. *See Tompkins v. Cyr*, 202 F.3d 770, 787 (5th Cir. 2000).

Moreover, the plaintiff should not be afforded any special leniency because he was proceeding pro se when the initial suit papers were filed. He is an educated person who had researched the issues sufficiently to know (and cite) the state law that afforded immunity to any person such as the defendants who served on a medical review board. *See* Va. Code Ann. § 8.01-581.16 (Michie Supp. 2002). He has filed other cases pro se in this and other courts. *See, e.g.*, *Payman v. Joyo*, No 2:01CV00128, 2002 WL 1821635 (W.D. Va. Aug. 8, 2002).

It is true that the plaintiff amended his complaints after he obtained counsel and after he had received the Rule 11 motions from the defendants. However, the Amended Complaints did not constitute a withdrawal or correction of the earlier pro se pleadings. They merely fashioned the factual allegations into legal form and attached the names of legal theories of recovery to them.

The plaintiff asserts a procedural bar to the motions for sanctions, claiming that they were untimely, since they were filed after the court had granted summary judgment. However, the rule contains no express time limit and as long as the motion is served on the offending party prior to the conclusion of the case, it may be filed with the court within a reasonable time after judgment has been entered. *See Truelove v. Heath*, No. 95-3009, 1996 WL 271427, at *2 (4th Cir. May 22, 1996) (unpublished) (holding that motion under Rule 11 filed after conclusion of case but served on defendant more than twenty-one days before dismissal was properly served and filed.)

Appendix C

B.

Having held that sanctions are proper in these cases, the next task is to determine the nature of such sanctions. Rule 11 allows directives of a nonmonetary nature, a monetary penalty payable into court, or reimbursement of some or all of the movant's reasonable attorneys' fees and other expenses "incurred as a direct result of the violation." Fed. R. Civ. P. 11(c)(2).

Particularly since the offending party here is a nonlawyer, a nonmonetary sanction such as a reprimand, suspension from practice, or a requirement of additional continuing legal education, is inappropriate. The most effective sanction in this case, taking into account the purpose of Rule 11, is reimbursement of attorneys' fees. In considering such a monetary sanction, I must take into account "(1) the reasonableness of the opposing party's attorney's fees; (2) the minimum to deter; (3) the ability to pay; and (4) factors related to the severity of the Rule 11 violation." *In re Kuntsler*, 914 F.2d 505, 523 (4th Cir. 1990).

The defendants have submitted itemized statements of their attorneys' fees and expenses, which total $22,668.59 for Dr. Abdrabbo and $5,460.64 for Dr. Mirza. I find these fees and expenses to be reasonable, but "[t]he primary purpose of Rule 11 is not compensation of the offended party, but rather deterrence of future litigation abuse." *Brubaker v. City of Richmond*, 943 F.2d 1363, 1370 n.7 (4th Cir. 1991). Considering all of the relevant factors, I find that an appropriate sanction is to require the plaintiff to pay each of

the defendants the sum of $2,500.[2] The conduct was egregious; moreover, there is some evidence of malice, particularly in light of his allegation in the suit papers that the defendants "left the area soon after [the hospital] was investigated by federal authorities." There is no evidence that the defendants fled any investigation, in spite of this innuendo. As a physician himself, the plaintiff would know the likely professional complications to the defendants engendered by a lawsuit, regardless of its lack of merit.

III

For the foregoing reasons, the Motions for Sanctions will be granted and sanctions awarded. Separate judgments consistent with this opinion are being entered herewith in the cases.

ENTER: March 3, 2003

s/ James P. Jones
United States District Judge

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2. There is no direct evidence of the plaintiff's ability to pay, but he is a physician who is board certified in obstetrics and gynecology. His prior contract with the hospital provided for annual compensation of $250,000 plus payment of professional liability insurance coverage, health insurance, and professional memberships. Presumably that contract is a fair measure of the plaintiff's earning ability. He has not claimed in response to the Rule 11 motions that he is unable to pay a reasonable sanction. The burden is on the party being sanctioned to show his financial *status*. *See In re Kunstler*, 914 F.2d at 524.

APPENDIX D — LETTER FROM BAHMAN PAYMAN, MD DATED FEBRUARY 5, 2002

Bahman Payman, MD.
319 Locust Street
Pennington Gap, VA 24277
Plaintiff, V.

Atique Mirza, MD.
56 Independence Drive
Chestnut Hill, MA 02467
Defendant.

I am Bahman Payman, MD. Filing suit against Dr. Atique Mirza who was chairman of the executive committee at Lee County Community Hospital in 2000. Dr. Mirza abused his power as a chairman of the executive committee and misrepresented me in bad faith and malicious intent at LCCH. Under the assumption that he has civil immunity (8.01-581.16.). He then left the area soon after LCCH was investigated by federal authorities.

As a result LCCH terminated my employment, and I lost my eight years practice in Lee County, also I lost the good reputation that I had established. Besides economical loss, I have suffered psychological as well as emotional burdens along with my family.

Therefore the plaintiff moves for a judgment against the defendant, Dr. Mirza, in the amount of ninety five thousand dollars ($95,000) together with cost and interest.

Bahman Payman, MD
2-5-02

APPENDIX E — MOTION FOR LEAVE TO FILE AMENDED COMPLAINT AND FOR LEAVE FOR ADDITIONAL TIME TO RESPOND TO MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT FILED JUNE 27, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA BIG STONE GAP DIVISION

Civil Action No.: 2:02CV00035

BAHMAN PAYMAN, M.D.

Plaintiff

v.

KHALOUCH ABDRABBO, M.D.

Defendant

MOTION FOR LEAVE TO FILE AMENDED COMPLAINT AND FOR LEAVE FOR ADDITIONAL TIME TO RESPOND TO MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT

Bahman Payman, M.D., by counsel, respectfully moves for leave to file an amended complaint and for an extension of time to respond to the pending Motions to Dismiss or for Summary Judgment, stating as follows:

1. Plaintiff's Motion For Judgment was filed *pro se* in state court and, as observed in Defendant's Motions, does

not clearly set out the legal claims being made. Counsel has just accepted engagement in this case and has filed a Notice of Appearance.

2. Defendant has filed a Motion To Dismiss or, in the alternative, for Summary Judgment. The Court by Order entered June 13, 2002, granted Plaintiff 20 days to respond to those Motions.

3. Dr. Payman is out of the state through the Independence Day holidays and is unavailable to assist counsel in the preparation of affidavits or other responsive materials prior to the expiration of such period.

4. Plaintiff prays for leave to file an Amended Complaint more adequately setting forth his claims. Should such leave be granted, Defendant's pending Motions would be moot.

5. In the event that the Court should deny the Motion to file an Amended Complaint, Plaintiff respectfully requests that the time for responding to the pending Motions be extended for a reasonable time thereafter.

BAHMAN PAYMAN, M. D.

BY COUNSEL

Michael A. Bragg
Bragg & Associates, PLC
P. O. Box 1866
Abingdon, Virginia 24212
276-628-9160

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, BIG STONE GAP DIVISION DATED JULY 3, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

Case No. 2:02CV00035

BAHMAN PAYMAN, M.D.,

Plaintiff

v.

KHALOUCH ABDRABBO, M.D.,

Defendant

ORDER

By: Pamela Meade Sargent
United States Magistrate Judge

It appearing proper, it is ORDERED as follows:

1. The plaintiff's Motion for Leave, (Docket Item No. 23), is granted;

2. The Order requiring a response entered June I3, 2002, is rescinded; and

3. The plaintiff is granted leave to file an amended complaint within 20 days of the date of entry of this Order.

ENTER: July 3rd, 2002.

s/ Pamela Meade Sargent
United States Magistrate Judge

APPENDIX G — MOTION FOR SANCTIONS OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, BIG STONE GAP DIVISION DATED JUNE 28, 2002

IN UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

Case No. 2:02CV00035

BAHMAN PAYMAN, M.D.,

Plaintiff

v.

KHALOUCH ABDRABBO, M.D.,

Defendant

MOTION FOR SANCTIONS

The Defendant, Khalouch Abdrabbo, M.D., moves the Court pursuant to Rule 11 (c)(1)(A) of the Federal Rules of Civil Procedure for sanctions against plaintiff, including payment to defendant of some or all of defendant's reasonable attorney's fees and expenses incurred as a direct result of filing of this action, upon the following grounds:

1. The Complaint is being presented for an improper purpose, including the harassment of defendant, and not to vindicate any genuine legal right of plaintiff;

Appendix G

2. The claims alleged in the Complaint are not warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law; and

3. The allegations in the Complaint lack evidentiary support.

KHALOUCH ABDRABBO, M.

By Counsel

PENN, STUART & ESKRIDGE
P.O. Box 2288
Abingdon, VA 24212
276/628-5151 (telephone)
276/628-5621 (facsimile)

By: _____/s/_____
WM. W. ESKRIDGE
VSB # 3635
Of Counsel for Defendant

MICHAEL N. PETROVICH, ESQ.
Jackson Lewis Schnitzler & Krupman
1156 15th Street, N.W., Suite 250
Washington, D.C. 20005
202/216-5504
202/223-8557
Counsel for Defendant

APPENDIX H — AMENDED COMPLAINT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, BIG STONE GAP DIVISION DATED JULY 3, 2002

IN UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

Case No. 2:02CV00035

BAHMAN PAYMAN, M.D.,

Plaintiff

v.

KHALOUCH ABDRABBO, M.D.,

Defendant

AMENDED COMPLAINT

Bahman Payman, M.D., by counsel, respectfully states as follows:

1. Plaintiff is citizen of the Commonwealth of Virginia. To plaintiff's information, Defendant is a citizen of the nation of Syria. The amount in controversy exceeds $75,000.

2. Plaintiff is a physician licensed in Virginia and specializing in obstetrics. Until some time ago, Plaintiff engaged in the practice of his profession in Lee County, Virginia, in the Western District of Virginia, with privileges at Lee County Community Hospital. At times pertinent to

Plaintiff's claims herein, Defendant also was a physician practicing in Lee County at said hospital.

3. In 1999 and 2000, Defendant conspired and acted with other physicians to interfere with Plaintiff's contractual relationship with Lee County Hospital, with Plaintiff's reasonable professional opportunities with other hospitals, and to injure Plaintiff to his professional reputation and profession.

4. As a result of Defendant's acts and the acts of his co-conspirators, Plaintiff lost his relationship with Lee County Hospital, his reasonably expected opportunities with other local hospitals, and has been substantially damaged in his professional reputation and practice.

COUNT ONE

5. The allegations of paragraphs 1-4 are repeated and incorporated herein by reference.

6. The acts of Defendant and his co-conspirators were tortuous, malicious, in bad faith and in violation of Virginia Code Section 18.2-499. Defendant is liable to Plaintiff under Virginia Code Section 18.2-500 for treble damages, costs, and attorneys fees.

Appendix H

COUNT TWO

7. The allegations of Paragraphs 1-4 are repeated and incorporated herein by reference.

8. Defendant has intentionally, willfully, maliciously and in bad faith interfered with Plaintiff's then-existing contractural relationships and his legitimate professional expectations and opportunities.

Trial by jury is demanded.

Wherefore, Plaintiff demands judgment against Defendant in the amount of $95,000, treble damages, attorneys fees, and cost expended.

BAHMAN PAYMAN, M.D.

By Counsel

Michael A. Bragg
Bragg & Associates, PLC
P.O. Box 1866
Abingdon, Virginia 24212
276-628-9160